FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 27 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 730

ALICE S. CAMPBELL, as Administratrix of the Estate of WILLIAM R. CAMPBELL, also known as William Richard Campbell, deceased; and TOWNSEND L. SCHOONMAKER, as Administrator of the Estate of ALFRED G. SCHOONMAKER, also known as Alfred Garrison Schoonmaker, Jr., deceased,

Petitioners,

vs.

ROLANDO J. MATTEUCCI, Administrator of the Estate of IVAN R. SPONG, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

EDGAR ALLYN BUTTLE,
36 West 44th Street,
New York 36, N. Y.

EDMUND H. H. CADDY,
30 Broad Street,
New York 4, N. Y.

MILTON S. SELIGMAN,
First National Bank Building,
Albuquerque, New Mexico,

Attorneys and Counsel for Petitioners.

INDEX.

	PAGE
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
QUESTION PRESENTED FOR REVIEW	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT	6
1. Decision of Circuit Court of Appeals for Tenth Circuit affirming judgment of District Court grants immunity to pilot of common air carrier whose negligence is alleged to have caused plaintiffs' decedents' death, in direct violation of the Fourteenth Amendment to the United States Constitution	6
2. The question presented has not been decided by this Court although it is of the greatest importance to passengers of common air carriers flying over States having statutes similar to those involved herein	7
CONCLUSION	19

APPENDIX A—Opinion of United States Court of Appeals for the Tenth Circuit, on appeal from the United States District Court for the District of New Mexico 20

Cases Cited.

	PAGE
Chicago M. & St. Paul R. R. v. *Westby*, 178 Fed. 619 (8th Cir. 1910)	16
In Re Opinion of the Justices, 211 Mass. 618, 98 N. E. 337 (1912)	17
In Re Opinion of the Justices, 220 Mass. 627, 108 N. E. 807 (1915)	17
Louis v. *Boynton*, 53 Fed. 2d 471	13
Morey v. *Doud*, 354 U. S. 457	13
Milton v. *Bangor Ry.*, 103 Maine 218, 68 A. 826	13
Natseway v. *Jojola*, 56 N. M. 793, 251 P. 2d 274	12
Noel v. *Menninger Foundation*, 175 Kan. 751, 267 P. 2d 934 (1954)	16
Northern Pacific Ry. Co. v. *North Dakota*, 236 U. S. 585 (1915)	13
Parlett Cooperative v. *Tidewater Lines*, 164 Md. 405, 165 A. 313	13
People v. *Gidaly*, 35 Calif. Ap. 2d Supp., 758 (93 P. 2d 660)	13
President and Directors of Georgetown College v. *Hughes*, 130 Fed. 2d 810 (D. C. Circ. 1942)	11
Re Reilly's Estate (Walker v. *Matteucci)*, 63 N. M. 352, 319 P. 2d 1069 (1957)	9
Skinner v. *Oklahoma*, 316 U. S. 535 (1942)	13
Truax v. *Corrigan*, 257 U. S. 312 (1921)	13, 16
Truax v. *Raich*, 239 U. S. 33 (1915)	13
Trujillo v. *Prince*, 42 N. M. 337, 78 P. 2d 145 (1938)	15
West v. *Jaloff*, 113 Ore. 184, 232 P. 642 (1925)	16
White v. *Montoya*, 46 N. M. 241, 126 P. 2d 471	13
Whitmer v. *El Paso & S. W. Co.*, 201 Fed. 193 (5th Cir. 1912)	15

PAGE

STATUTORY PROVISIONS INVOLVED:

New Mexico Statutes Annotated, 1953:

Sections 22-20-1 ..... 2, 3, 6, 10, 11, 12, 14
22-20-2 ..... 2, 3
22-20-3 ..... 2, 3
22-20-4 ..... 2, 6, 10, 11, 12, 14

TEXTS.

Professor Corwin, "The Constitution and What it Means Today" (pp. 204 *et seq.*) 13

12 Am. Jur., Constitution Law, Sections 504-5-7, 532 19

Supreme Court of the United States

OCTOBER TERM, 1958.

No. .....

ALICE S. CAMPBELL, as Administratrix of the Estate of WILLIAM R. CAMPBELL, also known as William Richard Campbell, deceased; and TOWNSEND L. SCHOONMAKER, as Administrator of the Estate of ALFRED G. SCHOONMAKER, also known as Alfred Garrison Schoonmaker, Jr., deceased,

Petitioners,

vs.

ROLANDO J. MATTEUCCI, Administrator of the Estate of IVAN R. SPONG, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Alice S. Campbell and Townsend L. Schoonmaker, by their attorneys, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this cause on November 29, 1958.

Opinions Below.

No written opinion was rendered by the United States District Court for the District of New Mexico. The opinion

of the Court of Appeals is reported in 261 F. 2d 225 and appears in the Record on Certiorari at pages 3 and 4 and a printed copy thereof is appended to this petition.

Statement of Jurisdiction.

The judgment of the Court of Appeals for the Tenth Circuit, sought to be reviewed, was dated November 29, 1958, and entered on the same day.

The jurisdiction of this Court is invoked under 28 USC Sec. 1254(1).

Question Presented for Review.

Do Sections 22-20-1, 22-20-2, 22-20-3 and 22-20-4 of the New Mexico Statutes Annotated, of 1953, as construed by the District Court of New Mexico, granting to a pilot or driver of a common carrier immunity from all civil liability for wrongful death, deny the equal protection of the laws guaranteed by the United States Constitution and the Constitution of New Mexico, as well as violate the prohibition against special privileges and immunities contained in the State Constitution.

Constitutional and Statutory Provisions Involved.

The following constitutional and statutory provisions are involved and the pertinent parts are quoted herein as follows:

The Constitution of the United States:

"AMENDMENT XIV.

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of New Mexico:

Article II, Section 18, provides

"No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the laws."

Article IV, Section 26, provides

"The legislature shall not grant to any corporation or person any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state."

New Mexico Statutes Annotated, 1953:

"SECTION 22-20-1. Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

"SECTION 22-20-2. Every action instituted by virtue of the provisions of this and the preceding section must be brought within three (3) years after the cause of action shall have accrued.

"SECTION 22-20-3. Every such action as mentioned in Section 1821 (22-20-1) shall be brought by

and in the name or names of the personal representative or representatives of such deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased: Provided, he or she shall have left a husband, wife, child, father, mother, brother, sister or child or children of the deceased child, but shall be distributed as follows:

* * * * * *

"SECTION 22-20-4. Whenever any person shall die from any injury resulting from, or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car, or train of cars, or of any driver of any state (stage) coach or other public conveyance, while in charge of the same as driver; and when any passenger shall die from injury resulting from or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car, or in any stage coach, or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, engineer or driver, shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage coach, or other public conveyance, at the time any injury is received, resulting from, or occasioned by any defect or insufficiency above declared, shall, forfeit and pay for every person or passenger so dying, the sum of ten thousand dollars ($10,000), which may be sued and recovered; first, by the husband or

wife of the deceased; or second, if there be no husband or wife, or if he or she fails to sue within six (6) months after such death then by the minor child or children of the deceased; or third, if such deceased be a minor and unmarried, then by the father and mother; or fourth, if the deceased be over twenty-one (21) years of age and unmarried, by a dependent father or mother or dependent brother or sister, who may join in the suit; and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. In the event there are no such persons entitled to sue or in the event suit is not brought by any such persons within nine (9) months after such death, suit may be brought by the personal representative or representatives of such deceased person."

Statement of the Case.

The judgment of the Court of Appeals for the Tenth Circuit, sought to be reviewed, affirmed the judgment of the District Court for New Mexico striking that part of the complaint of the plaintiffs alleging claims for wrongful death. The basis of the District Court's jurisdiction was diversity of citizenship of the parties and the amount involved exceeding $3,000.

This is an action for the wrongful death of William R. Campbell, also known as William Richard Campbell, and of Alfred G. Schoonmaker, also known as Alfred Garrison Schoonmaker, passengers on a Trans World Airlines airplane which crashed while off course in the Sandia Mountains on a flight from Albuquerque to Santa Fe, New Mexico. All passengers and crew were killed. The plaintiffs-appellants, residents of the States of New Jersey and California, respectively, as administrators of the estates of William R. Campbell, also known as William Richard Campbell, and of Alfred G. Schoonmaker, also known as Alfred Garrison Schoonmaker, brought suit under Section

22-20-1, New Mexico Statutes, Annotated, 1953, against Rolando J. Matteucci, a resident of New Mexico, as administrator of the estate of Ivan R. Spong, the pilot of the aircraft involved, in the United States District Court for the District of New Mexico, alleging that death had been proximately caused by the negligence, recklessness and carelessness of the pilot Spong, and his violation of applicable laws and regulations, in the operation of said airplane, and that he was the captain of the aircraft and in full charge of its operation and its crew, and in each case demanding damages in excess of $10,000.00. The defendant moved in the District Court for a dismissal of the action on the ground that Section 22-20-4, New Mexico Statutes, Annotated, 1953, is the exclusive statute under which an action for wrongful death may be brought when the death is caused as a result of the negligent operation of a public conveyance by the driver, or in the instant case, by the pilot thereof, and that no action exists under the laws of New Mexico against the pilot.

The District Court granted defendant's motion and dismissed that part of the complaint seeking recovery for the wrongful deaths. Plaintiffs thereupon appealed to the Circuit Court of Appeals for the Tenth Circuit. The argument of the appeal was duly had and the Tenth Circuit Court of Appeals affirmed the judgment of the District Court.

Argument and Reasons for Allowance of the Writ.

1. The decision of the Circuit Court of Appeals for the Tenth Circuit affirming the judgment of the District Court construes the statutes of New Mexico so as to grant civil immunity to the driver or pilot of a common carrier whose negligence is alleged to have caused the death of plaintiff's decedents, in direct violation of the provisions

of the Fourteenth Amendment to the United States Constitution forbidding any state to deny the equal protection of the laws to any person within its jurisdiction. This is a decision on an important question of interpretation of the equal protection clause of the United States Constitution, Fourteenth Amendment, which has not been, but should be, settled by this Court.

It is of the greatest importance to the constantly increasing hundreds of thousands of passengers carried over all parts of the United States by common carriers each of whom trustfully places his life and safety in the nearly absolute control of the pilot when he boards the aircraft. The pilots of such air carriers are often the operative cause of injuries to or the death of passengers on the aircraft. This is also true as to the operators of other public conveyances by highway, railway and over water. To grant such pilots and operators civil immunity from personal liability for their negligence resulting in death is a radical departure from the well established rules of civil liability for negligence, especially where civil liability remains undisturbed as to non-fatal personal injuries. Is it constitutional to reward a tort feasor with civil immunity from liability for the deaths caused by his tort so that he will suffer greater financial injury the more lives he saves.

2. The decision is also a precedent for extensive latitude for special interest state legislation heretofore believed to be forbidden by the equal protection clauses in state and federal constitutions. The most immediate result could be the granting of immunity from personal liability for wrongful death caused by negligence, gross negligence, criminal act or homicidal intent for persons in such categories as the following: state employees, federal employees, law enforcement officers, employees of regulated public utilities, employees of hospitals, physicians, labor union

officials, licensed operators of motor vehicles, aircraft and seagoing vessels, employees of banks, drivers of milk delivery vehicles, farmers, veterans and many others who for any constitutional reason can be specially classified by the legislatures.

The decision authorizing the granting of the immunity involved in the case at bar is also a precedent for the granting of other special privileges and immunities bearing no more reasonable relation to a proper legislative objective than that involved in this case. Since the right of action for wrongful death did not exist at common law and exists only by reason of state statute, the precedent created here is necessarily that the legislatures have the right to discriminate "unreasonably" in the granting of rights, privileges, immunities and remedies (and possibly in the imposition of burdens) as to rights and obligations which did not exist at common law. Laws relating to adoption, declaratory judgments, paternity, arbitration, public housing, elections, protection of civil rights, labor unions, public schools and the like, which are not based on the rules of the common law, could well be affected.

3. The decision of the Circuit Court of Appeals has decided an important question of interpretation of the Constitution of the State of New Mexico in a way which conflicts with the State Constitution. The Supreme Court of New Mexico, which is its highest appellate court, has never passed upon the constitutionality of the statutes in question here. Article II, Section 18, of the State Constitution provides

> "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the laws."

Article IV, Section 26, of the State Constitution reads

> "The legislature shall not grant to any corporation or person any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state."

It is submitted that the decision of the Circuit Court of Appeals constitutes an interpretation of the Constitution of the State of New Mexico which appears to be in direct conflict with the express provisions of said Constitution and not based on any similar interpretation by the Supreme Court of the State.

In the case of *Re Reilly's Estate* (*Walker* v. *Matteucci*) 63 N. M. 352, 319 P. 2d 1069 (1957), cited by the Court of Appeals as authority for decision herein, the New Mexico Supreme Court decided, in an action for wrongful death growing out of the same accident as is here involved, that common carriers by air are included with other common carriers within the terms of the statute ("other public conveyance"), and decided also that upon any set of facts bringing a case within the provisions of Section 22-20-4 recovery can only be had under that section and no action for causing death by negligent operation of a public conveyance will lie against the driver or pilot thereof. In that case, however, the constitutionality of Section 22-20-4 as interpreted by that court was not raised below and therefore the Supreme Court did not, and could not, consider that question. The constitutionality of that section as interpreted by the Court in *Re Reilly's Estate* and as urged by defendant-appellee in this action has been raised by the plaintiff-appellant below and is properly before this Court.

The constitutional question before this Court may be stated as follows: If Section 22-20-4 is interpreted to mean that where death is caused by the negligence of the driver or pilot of a public conveyance, such driver and pilot is immune from suit for damages resulting from such death, then said statute is unconstitutional, for said section of said statute grants to such driver or pilot a special immunity and privilege contrary to the special prohibition in the Constitution of New Mexico and equal-protection clauses of the Constitution of the United States and of New Mexico.

The applicable provisions of the Constitution of the United States are as follows:

"AMENDMENT XIV.

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The construction placed upon Sections 22-20-4 and 22-20-1, New Mexico Statutes Annotated, 1953, by both the District Court of New Mexico and the United States Court of Appeals for the Tenth Circuit, which construction grants to the operator of a common carrier immunity from civil liability for wrongful death, regardless of whether such death is the result of ordinary negligence, wanton negligence or felonious act on the part of such operator, violates the equal-protection clause of the Fourteenth Amendment of the United States Constitution quoted above.

In the case of *President and Directors of Georgetown College* v. *Hughes*, 130 Fed. 2d 810 (D. C. Circ. 1942), the Court stated (at p. 812) the basic principle of such cases as that at bar:

> "We start with general principles. For negligent or tortious conduct liability is the rule. Immunity is the exception. Human beings ordinarily are responsible for their own legally careless action. They respond also for negligent harms inflicted by their agents and employees. So do business corporations. Likewise trustees and other fiduciaries generally are liable for their own negligence in administration and operation of the business or property committed to their control. *Respondeat superior* more and more has made them, as it has private corporations, responsible for wrongs done by their inferior functionaries."

The District Court below in granting defendant's motion to dismiss the complaint decided that no action would lie against the pilot of a Trans World Airlines plane for the negligent killing of passengers of that plane in New Mexico, because it construed the provisions of Section 22-20-4, New Mexico Statutes Annotated, 1953, as excluding from liability any pilot of a common air carrier. This construction of the statute means that anyone killed by the negligence of the pilot of a common air carrier cannot recover through his legal representatives for his wrongful death except in a limited amount ($10,000) and then only against the owner or operator of that airplane.

A careful reading of Sections 22-20-4 and 22-20-1 shows that the legislature intended that whenever the death of a person was caused by the negligence of anyone, a person or a legal entity such as a corporation, such person or legal entity shall be liable in an action for damages and that

where such death is caused by the negligence of the pilot or driver of a public conveyance, there is an added benefit to the legal representatives of the deceased, in that $10,000, no more and no less, shall be forefeited to such legal representatives by the corporation or individual in whose employ such negligent pilot was operating the public conveyance and whose negligence was the cause of death. Section 22-20-4 can by no reasonable construction be construed as indicating a legislative intention to benefit corporations or individuals operating public conveyances, but rather to hold such privileged persons, permitted as they are to derive revenue from the public for their transportation, to the highest standard of care; the threat of punitive damage by way of forfeiture of the $10,000-payment being the instrument of public policy used by the legislature to discipline the operators and owners of public conveyances in maintaining the desired high standard of care.

The constitutionality of the construction given to Sections 22-20-1 and 22-20-4 NMSA 1953 by both the District Court of New Mexico and the United States Court of Appeals for the Tenth Circuit has never been considered by this Court.

The constitutionality of the construction of the statutes in this case turns on the single question: Would the granting to a pilot of immunity from liability for wrongful death only resulting from the negligent operation of a common air carrier be justified on any reasonable grounds of classification?

It must be borne in mind that the statute under consideration in the instant case is a survival statute wherein the cause of action arises on the date of injury, not the date of death, and it has been so held. (*Natseway* v. *Jojola*, 56 N. M. 793, 251 P. 2d 274). If the decision of the lower courts is permitted to stand it means that the personal representa-

tives of passengers of a common air carrier are denied the right to recover against the pilot thereof for injuries resulting in death while the courts would at the same time allow recovery against the pilot of a private plane and against the pilot of a common air carrier if said pilot was also the owner (*White* v. *Montoya*, 46 N. M. 241, 126 P. 2d 471), and against pilots of common air carriers for injuries not resulting in death. Such a result is an arbitrary and unreasonable classification and therefore is unconstitutional. It is a well-established principle of constitutional law that while a legislature has broad powers permitting it to classify persons without violating the Fourteenth Amendment of the United States Constitution, no classification that is arbitrary and unreasonable and not relevant to proper government purposes will be allowed to stand in the face of the equal-protection clause of the Fourteenth Amendment of the United States Constitution.

There are many cases supporting this basic proposition. We will cite but a few of them, not to unduly burden the Court with needless citations. The following cases are in point:

Morey v. *Doud*, 354 U. S. 457 (1957);
Skinner v. *Oklahoma*, 316 U. S. 535 (1942);
Truax v. *Corrigan*, 257 U. S. 312 (1921);
Truax v. *Raich*, 239 U. S. 33 (1915);
Northern Pacific Ry. Co. v. *North Dakota*, 236 U. S. 585 (1915);
People v. *Gidaly*, 35 Calif. Ap., 2d Supp., 758 (93 P 2d 660);
Louis v. *Boynton*, 53 Fed. 2d 471;
Parlett Cooperative v. *Tidewater Lines*, 164 Md. 405, 165 A 313;
Milton v. *Bangor Ry.*, 103 Maine 218; 68 A 826.

Professor Corwin, one of the leading authorities on Constitutional Law, in his book "The Constitution and

What it Means Today" has this to say in regard to the equal protection clause of the Fourteenth Amendment (pp. 204 *et seq.*):

> "The clause does not automatically rule out legislative classifications. Indeed, substantially all legislation involves classification of some sort. What the clause appears to require today is that any classification of 'persons' shall be reasonably relevant to the recognized purposes of good government; * * *. Thus, in view of the special dangers to which the railroad business exposes the public, railroad companies should be required to stand the heavy expense of elevating their grade crossings."

In considering whether or not the interpretation of a statute violates the equal-protection clause of the Fourteenth Amendment, the Court may consider whether at the time of the enactment of the statute the legislature had a reasonable basis for the classification that is attacked as unconstitutional. In the instant case it is hard to imagine any reasonable basis for classifying the pilot or driver of a common carrier of passengers as being properly immunized from liability for causing the death of a passenger either through wilfull act or negligence. (Both of these classes of acts are covered in Section 22-20-1 under which the instant suit is brought.) It is less possible to imagine such a classification when at the same time, as has been interpreted by the court below, such a pilot would be liable under Section 22-20-1 if he happened also to be the owner of the common carrier or if he were the pilot of a private passenger plane or if the passenger didn't die but was only injured.

The wording of Section 22-20-4 indicates clearly that the legislature recognized at the time these sections were enacted that it was in the public interest, in the interest

of good government, that public or common carriers of passengers should be held to a high standard of care, higher than the occasional private carrier of passengers, and for that reason they imposed a forfeiture upon such common carriers of passengers where either death was caused by defect in the equipment or where the operator or driver was negligent. Thus the legislature hoped to make the common carrier more careful in keeping its equipment in a safe operating condition and more conscientious in hiring operators, selecting the most capable and keeping them to a high standard of care in the operation of the equipment. With that as a background it is hard to conceive that the legislature at the same time felt that the operator should be immunized from liability for either negligently or wilfully causing death. Rather would the legislature have imposed greater liability on such operators than less. It is therefore inconceivable that the legislature intended the statute to have the meaning given it by the district court and the Court of Appeals.

In the case of *Trujillo* v. *Prince*, 42 N. M. 337, 78 P 2d 145 (1938), the Court, at page 345, said:

> "• • • our Death by Wrongful Act Statute has to some degree an objective of public punishment and was designed in part at least to act as a deterrent to the negligent conduct of others and thereby promote the public safety and welfare."

In the case of *Whitmer* v. *El Paso & S. W. Co.*, 201 Fed. 193 (5th Cir. 1912), the Court said, at page 198:

> "The statutes allowing damages for wrongful act or negligence causing death have for their purpose more than compensation. It is intended by them, also, to promote safety of life and limb, by making negligence that causes death costly to the wrongdoer."

It is only when the reasons are compelling ones of public policy that immunity from liability may be granted to a special class. See *Chicago M & St. Paul R. R.* v. *Westby*, 178 Fed. 619 (8th Cir. 1910), wherein the Court held a statute of South Dakota invalid which abolished the defense of contributory negligence in all suits by employees against common carriers whether said employees were engaged in a hazardous occupation or not.

In the case of *Truax* v. *Corrigan*, cited above, Chief Justice Taft said:

> "To sustain the distinction here between the ex-employees and other tort-feasors in the matter of remedies against them, it is contended that the legislature may establish a class of such ex-employees for special legislative treatment. In adjusting legislation to the need of the people of a state, the legislature has a wide discretion, and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary, and that questions of proper classification are not free from difficulty. But we venture to think that not in any of the cases in this court has classification of persons of sound mind and full responsibility having no special relation to each other, in respect to remedial procedure for an admitted tort, been sustained. Classification must be reasonable. As was said in *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 155, 41 L. Ed. 668, 17 Sup. Ct. Rep. 255, classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis.' "

In *Noel* v. *Menninger Foundation*, 175 Kan. 751, 267 P 2d 934 (1954), the Court said, at page 943:

> "To exempt charitable and non-profit corporations from liability for their torts is plainly contrary

to our constitutional guaranties, Bill of Rights, Sec. 18. It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs, which is a sign of equality between citizens. It undertakes to clothe charitable and non-profit organizations with special privileges denied to other corporations and society. It takes from individuals the right to assert in the courts claims against all who tortiously assail their persons and property and to recover judgment for the injuries done. It prevents all persons from having recourse to law for vindication of rights or reparation for wrongs against the privileged charitable, non-profit organization. It frees one set of corporations from obligations to which their competitors, and individuals, are subjected. In short, it destroys equality and creates special privilege."

See also *West* v. *Jaloff*, 113 Ore. 184, 232 P 642 (1925), wherein the Oregon Supreme Court held that a statute giving an ambulance the right of way over other vehicles did not relieve the driver from liability for negligence.

In the case entitled *In Re Opinion of the Justices*, 211 Mass. 618, 98 N. E. 337 (1912), the Court, in a case analagous to that at bar, stated:

"It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of quality between citizens and residents. It undertakes to clothe combinations of employers and laborers with special power denied to other employers and laborers and other members of society. In another aspect, it deprives all individuals and associations other than those named, of the protection to safety, liberty and property, which any free government must secure to its subjects."

Similarly *In Re Opinion of the Justices*, 220 Mass. 627, 108 N. E. 807 (1915), the Supreme Judicial Court of Massa-

chusetts held unconstitutional a proposed statute prohibiting railroad corporations from discharging employees by reason of information touching conduct until the employees concerned had been given an opportunity to make a statement in the presence of the person or persons furnishing the information. The court said at 108 N. E. 808:

> "Absolute equality before the law and equal protection of the laws are principles established by the Constitution of the United States and of this Commonwealth. Opinion of the Justices, 211 Mass. 618, 98 N. E. 337. While reasonable classifications may be made by the Legislature in the interests of the public health, public safety and public morals, yet there must be some rational relation between the object to be attained and the classification, in order that it may not violate the constitutional guaranty that all persons, including corporations, shall be equal in the protection afforded by the laws. Many such classifications have been upheld as not contrary to this principle. (Citing cases.) But the proposed bill has no reference to the safety of the travelling public. It applies only to one kind of common carrier and not to others. It imposes a burden upon railroads from which all other common carriers and employers of labor are free. It singles out employes of railroads and confers upon them immunities and advantages enjoyed by no others who work for individuals and corporations, in a particular which has no relation to the kind of employment engaged in by them. In both respects it tends to destroy equality. It creates of railroad employes a specially privileged class, and subjects railroads, to a matter having no special relation to their business as distinguished from other kinds of business, to obstacles and burdens from which other employers are free. There is strong grounds for the conclusion that the selection of railroads as the sole object of severely criminal legislation as to a matter of having no particular relation to the management of railroads

would be arbitrary and hence unwarrantable under the constitution." (Citing cases.)

It is submitted that the supposed object of the legislation is not accomplished by the classification, and even if there were a substantial difference between a carrier's operator and an owner or other operator of a vehicle, there is no reasonable relation to the object of the legislation. If the employee is left liable for injuries to persons, the legislation would accomplish the unsocial and abhorrent object of making the employee aware that if an accident is inevitable, the more deaths compared to injuries that result, the less his liability for damages. In case of an accident, therefore, regardless of his appraisal as to his own fault, his personal financial interest would be best served by rendering aid to those with minor injuries and withholding his aid from those who would probably die for lack of it.

The equal protection clause forbids such a classification which has no reasonable basis and no reasonable relation to the object, whether based on the police power or on the power to regulate carriers. 12 *Am. Jur.*, Constitutional Law, Sections 504-5-7, 532.

Conclusion.

It is respectfully submitted that the petition should be granted, and the Writ issue.

EDGAR ALLYN BUTTLE,
36 West 44th Street,
New York 36, N. Y.,

EDMUND H. H. CADDY,
30 Broad Street, New York 4, N. Y.,

MILTON S. SELIGMAN,
First National Bank Building, Albuquerque, New Mexico,

Attorneys and Counsel for Petitioners.

Appendix A.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT.

NOVEMBER TERM—1958.

ALICE S. CAMPBELL, as Administratrix of the Estate of WILLIAM R. CAMPBELL, also known as William Richard Campbell, deceased; and TOWNSEND L. SCHOONMAKER, as Administrator of the Estate of ALFRED G. SCHOONMAKER, also known as Alfred Garrison Schoonmaker, Jr., deceased,

Appellants,

vs.

ROLANDO J. MATTEUCCI, Administrator of the Estate of IVAN R. SPONG, deceased,

Appellee.

Filed United States Court of Appeals, Tenth Circuit. Nov. 29, 1958 Robert B. Cartwright, Clerk.

Number 5951.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

EDMUND H. H. CADDY and MILTON S. SELIGMAN for Appellants.

JAMES C. RITCHIE and JACKSON G. AKIN (RODEY, DICKASON, SLOAN, AKIN & ROBB was with them on the brief) for Appellee.

Before BRATTON, Chief Judge, and PICKETT and BREITENSTEIN, Circuit Judges.

PER CURIAM:

This was another action arising out of the crash of an airplane near Albuquerque, New Mexico, on February 19, 1955. The airplane was owned and operated by Trans World Airlines, Inc., a common carrier. Ivan R. Spong was the pilot in charge of the flight, and William Richard Campbell and Alfred Garrison Schoonmaker, Jr., were passengers. All three were killed. The administratrix of the estate of Campbell and the administrator of the estate of Schoonmaker instituted this action against the administrator of Spong to recover damages for wrongful deaths and for the value of certain personal property lost. The court entered judgment dismissing the action insofar as recovery for the deaths of Campbell and Schoonmaker were concerned, and awarding recovery for the reasonable value of the personal property lost. Plaintiffs appealed.

On the authority of In Re Reilly's Estate, 63 N. M. 352, 319 Pac. (2d) 1069, Tilly *v.* Flippin, 237 F. (2d) 364, and Schloss *v.* Matteucci, CA-10 ..... F. (2d) ....., decided October 9, last, the judgment is

Affirmed

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 27 1959
JAMES R. BROWNING, Clerk

No. 730

In the Supreme Court of the United States

OCTOBER TERM, 1958

ALICE S. CAMPBELL, as Administratrix of the Estate of WILLIAM R. CAMPBELL, also known as William Richard Campbell, deceased; and TOWNSEND L. SCHOONMAKER, as Administrator of the Estate of ALFRED G. SCHOONMAKER, also known as Alfred Garrison Schoonmaker, Jr., deceased,

Petitioners,

vs.

ROLANDO J. MATTEUCCI, Administrator of the Estate of IVAN R. SPONG, deceased,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

First National Bank Building
Albuquerque, New Mexico
WILLIAM A. SLOAN
Attorney at Law

JAMES C. RITCHIE and
ROBEY, DICKASON, SLOAN, AKIN & ROBB
Albuquerque, New Mexico
Of Counsel

TABLE OF CONTENTS

		PAGE
OPINIONS BELOW		2
QUESTION PRESENTED FOR REVIEW		2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED		2
STATEMENT OF THE CASE		3
ARGUMENT		3
POINT I	THE HISTORY OF THE NEW MEXICO DEATH ACT, ITS ADMINISTRATION AND JUDICIAL INTERPRETATION DEMONSTRATES ITS CONSTITUTIONALITY.	3
POINT II	THE NEW MEXICO DEATH ACT DOES NOT GRANT AN IMMUNITY	5
POINT III	THE CLASSIFICATION MADE IN THE NEW MEXICO DEATH ACT IS REASONABLE AND DOES NOT DENY EQUAL PROTECTION OF LAW.	7
CONCLUSION		13

INDEX *(Continued)*

CASES	PAGE
Barbier v. Connoly, 113 U.S. 27	7
Cain v. Bowlby, 114 F(2) 519 (10th Cir. 1940) cert. den. 311 U.S. 710	6
Davis v. Florida Power Co., 66 Fla. 589, 60 So. 759 (1913)	12
De Soto Motor Corporation v. Stewart, 62 F(2) 914 (10th Cir. 1932)	4, 7
Hammond Packing Company v. State of Arkansas, 212 U.S. 322	12
Hogsett v. Hanna, 41 N.M. 22, 63 P(2) 540 (1936)	9
Mallory v. Pioneer Southwestern Stages, 54 F(2) 559, 561 (10th Cir. 1931)	10
Nichols v. Atchison T. & S. F. Ry., 364 U.S. 348	11
Porter v. Investors Syndicate, 287 U.S. 346 (1932)	2
In Re Reilly's Estate, 63 N.M. 352, 319 P(2) 1069 (1958)	5
Romero v. Atchison Topeka & S. F. Ry. Co., 11 N.M. 679, 689; 72 P 37 (1903)	10
Sanford v. Poe, 69 F. 546 (6th Cir. 1895) aff'd in 165 U.S. 194	2
Schloss v. Matteucci, 260 F(2) 16 (10th Cir. October 9, 1958)	2, 4, 15
Tilly v. Flippin, 237 F(2) 364 (10th Cir. 1956)	4, 6, 7, 10
STATUTES AND RULES	
N.M.S.A. (1953)	
Section 22-20-1	3
Section 22-20-4	3
Laws, N.M. 1882, C 61	3

No. 730

In the Supreme Court of the United States

OCTOBER TERM, 1958

ALICE S. CAMPBELL, as Administratrix of the Estate of WILLIAM R. CAMPBELL, also known as William Richard Campbell, deceased; and TOWNSEND L. SCHOONMAKER, as Administrator of the Estate of ALFRED G. SCHOONMAKER, also known as Alfred Garrison Schoonmaker, Jr., deceased,

Petitioners,

vs.

ROLANDO J. MATEUCCI, Administrator of the Estate of IVAN R. SPONG, deceased,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The respondent is dissatisfied with the portions of the Petition entitled "Opinions Below, Question Presented for Review, Constitutional and Statutory Provisions Involved" and "Statement of the Case," for the reasons hereinafter stated.

OPINIONS BELOW

The petitioners have not complied with Rule 23(i) of this Court in that they have failed to append to the Petition an opinion from the Tenth Circuit in a companion case which opinion is necessary to ascertain the grounds of the judgment below. The companion case is *Schloss v. Matteucci*, 260 F(2) 16 (10th Cir., October 9, 1958) where the identical question presented for review to this Court was decided and where petitioners' counsel appeared as amicus curiae. A printed copy of the opinion in said case is appended hereto.

QUESTION PRESENTED FOR REVIEW

The sole question presented for review, correctly stated, is this: Is the equal protection clause of the United States Constitution violated by a New Mexico statute which creates a cause of action for wrongful death against a common carrier and provides for such action to be brought against the carrier and not the operator thereof?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

We take issue with the statement in the Petition that portions of the Constitution of the State of New Mexico are involved herein. If here be any conflict between the statutes and State Constitution quoted in the Petition (pp. 3, 4), a determination of that question is not necessary to the decision of this Court; therefore, such determination should not be made. *Porter v. Investors Syndicate*, 287 U.S. 346 (1932). See also *Sanford v. Poe*, 69 F. 546 (6th Cir. 1895) aff'd. in 165 U.S. 194, regarding the reluctance of Federal Courts to decide a question of constitutionality of a state statute under the state constitution and the problems involved where there is a later decision by the highest court of the state on such question.

We shall hereinafter refer to section 22-20-4 N.M.S.A. (1953) governing wrongful deaths caused by the negligence of common carriers or their agents as the "special section"; section 22-20-1, controlling deaths occasioned by the negligence of those other than common carriers, shall be denominated as the "general section."

STATEMENT OF THE CASE

The petitioners do not mention there was discussed in the briefs and argument below the fact that petitioners have also brought an action for the wrongful death of their respective decedents against the Trans World Airlines, Inc., the deceased pilot's employer. This action was filed in the United States District Court for the Southern District of New York, being cause No. 107-114 Civil on the docket of said court, and it is still pending.

ARGUMENT

At the outset it should be candidly observed that the sole objective of the petitioners in seeking to have the statutory interpretation of the courts below declared unconstitutional is to avoid the limitation on the amount of recovery for a death caused by the alleged negligence of a common carrier or its agents, as provided in the special section.

POINT I. THE HISTORY OF THE NEW MEXICO DEATH ACT, ITS ADMINISTRATION AND JUDICIAL INTERPRETATION DEMONSTRATES ITS CONSTITUTIONALITY.

The original New Mexico statutes creating a cause of action for wrongful death were enacted in 1882. Laws, N.M. 1882, C 61. Since their enactment and at all times material thereafter the statutes contained different pro-

visions for deaths caused by the negligence of common carriers and deaths occasioned by the negligence of others. These differences were: The amount which could be recovered, the party who could bring the action and the party against whom the action could be brought. The constitutionality of these statutes was never attacked from the time of their enactment until over forty years later in *De Soto Motor Corporation v. Stewart*, 62 F(2) 914 (10th Cir. 1932). In that case it was contended the New Mexico Death Act violated the same Federal and State Constitutional provisions as urged by the petitioners in this case. The precise vice claimed in the *De Soto* case was the limitation of the amount of recovery against common carriers and not against others. The Court stated at pp. 915, 916:

> "This statute has stood without challenge for more than 40 years. It was copied from a Missouri statute passed in 1855. The presumption of constitutionality that is accorded all legislative enactments is greatly strengthened by public acquiescence over a long period of time (citing cases). The case must be a clear one that would justify a court in striking down a statute which has regulated the affairs of the citizens of a state for more than 40 years. No such case is presented."

The constitutionality of the instant statutes was not again attacked until 1958, over 25 years later, in the case of *Schloss v. Matteucci, supra*, a companion case to the one at bar. Again the constitutionality was upheld. We submit that this long period of acquiescence by the public, interpretation and administration by courts and bar should be given great weight by this Court in its consideration of the Petition. Aside from the constitutional attack, other means recently have been sought to avoid the limitation of damages against carriers found in the special section. In *Tilly*

v. Flippin, 237 F(2) 364 (10th Cir. 1956) the plaintiff contended in a wrongful death action that a driver of a common carrier could be sued and a limitless recovery obtained under the general section since such driver was not specifically excluded from such section. The court stated at p. 366:

> "The argument is plausible but we think the implications of the decisions by the New Mexico courts, and by this court, lead to the conclusion that the remedy provided for in § 22-20-4 is an exception to the general death statute and is exclusive when death is caused under facts bringing the case within that section. Apparently the New Mexico bench and bar have construed the section as the trial court did. The section has been on the New Mexico statute books for approximately seventy-five years, and so far as we know, *no one* has sought to recover from a negligent employee in addition to recovery from the common carrier." (emphasis ours)

In another recent case, *In Re Reilly's Estate*, 63 N.M. 352, 319 P(2) 1069 (1958), the plaintiff (whose intestate was killed in the same T.W.A. plane crash as petitioners' decedents) attempted to escape the provisions of the special section and the resulting limitation of damages by contending a carrier by air could not be a common carrier within the meaning of such section. This contention was rejected. The contention that the estate of the deceased pilot could be sued under the general section was also rejected in this same case by the highest Court of the State of New Mexico.

POINT II THE NEW MEXICO DEATH ACT DOES NOT GRANT AN IMMUNITY.

In their attack on the constitutionality of the New Mexico Death Act, the petitioners repeatedly refer to a

"grant of civil immunity" to an operator or pilot of a common carrier. But is there such immunity granted? There is the very distinct possibility that a carrier-employer could recover indemnity from the driver-employee in the event the carrier had to satisfy a judgment obtained against it in an action for a death occasioned by the sole negligence of the employee. This was apparently the view taken by the court in *Tilly v. Flippin, supra*, when it stated that the construction of the statute as urged by petitioners herein might well "require a driver-employee to pay twice" (p. 369).

Another answer to the grant of immunity argument is this: Petitioners admit that the action for wrongful death did not exist at common law and is created by legislature enactment (Pet. p. 8). Being in derogation of the common law, the statute should be strictly construed. *Cain v. Bowlby*, 114 F(2) 519 (10th Cir. 1940) cert. den. 311 U.S. 710. It would seem to follow, therefore, that rather than a grant of immunity by the legislature there was a creation of a right which had never theretofore existed. In so doing the legislature naturally and carefully made distinctions upon and classifications of the right created.

POINT III THE CLASSIFICATION MADE IN THE NEW MEXICO DEATH ACT IS REASONABLE AND DOES NOT DENY EQUAL PROTECTION OF LAW.

The petitioners contend that the classification between a death occasioned by the negligence of a common carrier or its agents and that caused by other denies them equal protection of the laws because such classification prevents a direct action against the operator of a common carrier; as a result there is no opportunity to obtain a recovery in excess of the limitation provided by the special section. A

quick answer to this contention would be to say that petitioners are in no way denied the constitutional guaranty of equal protection since the personal representatives of all persons who meet death in a common carrier accident have the same and equal rights: They can sue the carrier under the special section. See *Barbier v. Connoly*, 113 U.S. 27. The equal protection argument would be more pertinent if the complainant were a competing airline to T.W.A. and the legislature had allowed a limitless recovery against such competitor.

Let us assume, arguendo, that petitioners are among the class who have standing to urge a violation of the constitutional guaranty. It is admitted in the Petition that the legislature had broad powers of classification but it is also contended that the classification here made and as interpreted by the courts below is unreasonable and arbitrary and hence unconstitutional (Pet. p. 13). Petitioners do *not* attack the decision of the Tenth Circuit in the case of *DeSoto Motor Corporation v. Stewart, supra*, holding that limitation of recovery against carriers and not against others was a reasonable classification and not violative of the equal protection clause. If limitation of damages were a reasonable classification in a death action against a carrier, why should a correlative limitation as to the party to be sued in such action be unreasonable? To ask the question is but to answer it. In the *DeSoto* case the court comments at page 916 on the legislative power to classify carriers in negligence actions:

> "The guaranty of the equal protection of the laws does not deny to a Legislature the right to classify along reasonable lines. From the earliest times, it has been recognized that the relations of a common carrier to the public, or to its employees, are properly the subject of

special legislation. . . . Given, then the power to put the negligence of carriers into a separate category, it is still insisted that there is neither rhyme nor reason in placing a limit on the amount of recovery against them, and no such limit where another causes the death. The power to classify carries with it the power to establish different sets of rules applicable to the different classes; and it is not fatal that the particular rules within the set may result in some inequality when applied to specific instances. In Second Employers' Liability Case, 223 U.S. 1, 53, 32 S. Ct. 169, 176, 56 L. Ed. 327, 38 L.R.A. (N.S.) 44, a statute was challenged which imposed an employer's liability upon interstate carriers by railroad, and not upon other interstate carriers. The statute was upheld, the court saying that the equal protection guaranty 'does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion, in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary'. (citing cases) There being no question as to the power of the Legislature to make the general classification, it is not necessary to seek a reason to support the particular clause of the Statute under attack. Reasons therefor; however, immediately suggest themselves."

And so in the case at bar "reasons suggest themselves" as to why the legislature did not provide for the wrongful death action to be brought against the driver-employee in addition to the carrier-employer:

1. If suit were allowed against the driver or pilot un-

der the general section and judgment obtained in excess of the $10,000 limitation provided in the special section, and such judgment were not satisfied, recovery could then be sought against the carrier for the amount of the judgment under the doctrine of respondeat superior. In that regard the New Mexico Supreme Court has squarely held that the master is liable under the general section for a death caused by the tort of the servant. *Hogsett v. Hanna*, 41 N.M. 22, 63 P(2) 540 (1936). Accordingly there could be a circumvention of the damage limitation provision of the special section. To prevent such circumvention the legislature wisely provided that the action for a carrier death should be brought solely against the carrier under such section.

2. The classification is reasonable because it prevents the carrier or its operator from having to respond twice in damages for the same death. Suppose the petitioners obtain judgment against the carrier in their New York action and are also allowed to recover from the pilot's estate in the case at bar. Upon satisfaction of the New York judgment indemnification could be sought by the carrier from the pilot's estate. The pilot's estate is thus twice vexed for the same death. Or suppose the pilot's estate fails to satisfy the judgment. Under the doctrine of respondeat superior the carrier would be vicariously liable for such judgment even though it had previously satisfied the judgment obtained against it in the New York action. These suppositious cases demonstrate the inescapable result if petitioners' position is upheld.

3. There should not be two recoveries for the same death; to prevent this the legislature classified the two types of death and provided that where a death was caused by a common carrier or its agents the action could only be brought against such carrier under the special section and

not also against the operator-employee under the general section, as urged by petitioners. That there should be only one action for one death under the instant statutes was the view of the New Mexico Supreme Court in *Romero v. Atchison Topeka & S. F. Ry. Co.*, 11 N.M. 679, 689; 72 P 37 (1903) which was the first time said statutes were construed. It was there contended in a carrier death that the action could be brought under both sections at the same time. The court remarked:

> ". . . the contention is repugnant to what we conceive to be the plain meaning of the statute, as it is incomprehensible that the Legislature should intend to provide a double remedy in damages for one and the same injury, and between practically the same parties."

And again the Tenth Circuit in *Mallory v. Pioneer Southwestern Stages*, 54 F(2) 559, 561 (10th Cir. 1931) it was said:

> "It is clear that the legislature did not intend to create two rights and provide two remedies for the same wrongful death."

Finally, in *Tilly v. Flippin, supra*, the court flatly states that to construe the statute so as to allow an action under the general section against the operator-employee "would permit a double recovery for the same death." Petitioners, having instituted a separate action in New York against the carrier-employer for the same deaths, have graphically demonstrated one of the reasons for and wisdom of the classification which they here urge as unreasonable and as a denial of equal protection. They face up to their dilemma by describing the $10,000 amount provided under the special section as an "added benefit" by way of "punitive damage" rather than a double recovery; they state a "careful reading" of the two sections shows this was the legislative intent

(Pet. pp. 11, 12). The force of this argument is completely sapped by a decision of this Court wherein it was held that the damages provided for in the special section were compensatory rather than punitive. In *Nichols v. Atchison T. & S. F. Ry.*, 364 U.S. 348, 351, it was contended that the New Mexico special section could not be enforced or administered in the California Courts because it was a penal statute and theerfore in conflict with the policy and laws of the State of California. This contention was rejected and this Court said:

> "The law of New Mexico is within the principle and description of those rulings, and of Huntington v. Attrill. It is in reparation of a private injury, not in punishment of 'an offense against the public justice of the state.' Its reparation is in a fixed amount, it is true; but it is an amount that has been fixed by a consideration of the determining factors, they necessarily having a certain similarity in all cases. It was the legislative judgment, therefore, that the interests of the state would best be served by an exact definition of the measure of responsibility and relief when the circumstances were such as are represented in the law. It is not less reparative because so defined."

4. Another reason for the classification allowing suits against the carrier alone lies in the possible legislative intent that otherwise it would be difficult to obtain competent and responsible operators for the vehicles in which the public was transported. A competent railroad engineer, faced with the possible tremendous loss to him or his estate because of personal liability for a wreck in which there were many deaths, might decline employment. Admittedly, this reason is not as forceful as those given above; however, it it far more plausible than petitioners' ridiculous assertion that

the classification is unreasonable because it would cause the same engineer to withhold first aid from those critically injured and give it to others! (Pet. p. 19)

Our research has disclosed that the Supreme Court of the State of Florida has also passed upon the question presented for review to this Court. In *Davis v. Florida Power Co.*, 66 Fla. 589, 60 So. 759 (1913) the court upheld the constitutionality of a statute which created a cause of action in the parents for the wrongful death of their minor child; the statute provided that where the death was occasioned by the neglect of any private association of persons, corporations or its agents, the action could be maintained against such "private association of persons or corporation." It was contended, as do petitioners herein, that the statute was unconstitutional as violative of the equal protection clause of the Federal and State Constitution because it did *not* provide that the action could also be brought against the individual whose neglect had caused the death. This contention was denied by the Florida court in a well reasoned opinion. And as stated by this Court in *Hammond Packing Company v. State of Arkansas*, 212 U.S. 322, 349:

> "Even if, as contended, the remedy given by the act for the production of books and papers and the examination of witnesses is confined to corporations and joint stock companies, *and does not extend to individuals*, that fact furnishes no ground for the proposition that a denial of the equal protection of the laws thereby resulted." (emphasis ours)

CONCLUSION

For the reasons stated above the Petition for Certiorari should be denied.

WILLIAM A. SLOAN
Attorney at Law
First National Bank Building
Albuquerque, New Mexico

JAMES C. RITCHIE and
RODEY, DICKASON, SLOAN, AKIN & ROBB
Albuquerque, New Mexico

Of Counsel

APPENDIX A

SEPTEMBER TERM - 1958

MILTON J. SCHLOSS, Executor of the Estate of DAN A. COLLIER, deceased,

Appellant, *Number* 5921

vs.

ROLAND J. MATTEUCCI, Administrator of the Estate of IVAN R. SPONG, deceased,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Robert Nordhaus for Appellant.
Milton S. Seligman, Amicus Curiae.
James C. Ritchie and Jackson G. Akin for Appellee.
Before MURRAH, PICKETT and BREITENSTEIN, Circuit Judges.

MURRAH, Circuit Judge.

The estate of one of the passengers on a Transworld Airlines regularly scheduled flight sued the Company and its pilot's estate, alleging that the pilot's negligence caused a crash of the airplane in New Mexico in which all passen-

gers and crew perished. At the time of the disaster, a New Mexico statute provided that whenever a person shall die from the negligence of an employee while driving a public conveyance, the owner of such public conveyance shall forfeit and pay for every person so dying the sum of $10,000.00. § 22-20-4, N.M.S.A. 1953.[1]

This court and the New Mexico Supreme Court have construed this statute to exclude any liability of the negligent employee for the wrongful death. *Tully v. Flippin*, 237 F.2d 364, and In *re Reilly's Estate*, 319 P.2d 1069. Following this construction, the trial court awarded the statutory amount against the Airline and dismissed the action against the pilot's estate.

On this appeal from the judgment of dismissal, the appellant accepts the construction placed upon the statute by the court, but earnestly contends that so construed, it is repugnant to the equal protection clauses of the federal and state constitutions.

One argument is that it is unconstitutionally discriminatory to deny a right of action for wrongful death against a negligent employee of a public conveyance, while granting the right against other negligent employees, under New Mexico's conventional wrongful death statute. § 22-20-1, N.M.S.A. 1953. Another equal protection objection to the statute (presented amicus curiae) is that conceding the constitutional power of the legislature to distinguish between liability of employees of public conveyances and others for wrongful death, the classification here must nevertheless fail because the Act unconstitutionally relieves a negligent operator of a public conveyance of all liability

[1]Since this accident, New Mexico has removed the fixed sum penalty, and provided for conventional compensatory and exemplary damages in "such sum as a jury may deem fair and just * * * ."

for wrongful death, while leaving him liable for personal injuries not resulting in death. This classification is said to serve no legitimate legislative purpose and is therefore without constitutional basis or justification.

Historically, and especially in later times, the federal courts have been extremely reluctant to strike down state legislation as a denial of the equal protection of the laws, except in cases involving civil rights. In cases like ours, the federal courts interfere with state legislative proecsses only when there is no ascertainable basis for rational classification or discrimination. *Morey v. Dowd*, 354 U.S. 457, Classifications have been made to rest upon an almost infinite variety of facts and circumstances. See *Willoughby on the Constitution of the United States*, 2d Ed., § 1273; 12 Am. Jur. Constitutional Law, § 476 et seq. "The prohibition of the equal protection clause goes no further than the invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U.S. 483. Protection against unwise and improvident legislation lies in the exercise of the suffrage right, not in the courts. "We do not 'sit as a super legislature.' " Dissenting opinion, *Colgate v. Harvey*, 296 U. S. 404, 441, quoted by Mr. Justice Frankfurter, dissenting in *Morey v. Doud, supra.*

We need not go far in our search for a rational basis for this legislative classification. Looking first to the legislative scheme and design, it is readily apparent that the legislature intended to provide a fixed sum recovery for wrongful death caused by the negligence of a common carrier's employee, and this without regard to compensatory or pecuniary loss. Indeed, the appellant does not now challenge the constitutionality of the act insofar as it provides a fixed sum recovery for the liability of the owner of a public conveyance. And see *De Soto Motor Corp. v. Stewart*, 62 F.2d 914.

Having thus afforded a fixed penalty against the carrier for wrongful death, it is not a denial of the equal protection of the law for the legislature to provide that such sum should be exclusive of all other liability for wrongful death, thereby precluding recovery against the negligent employee. It is not constitutionally unlike the Workmen's Compensation and Harbor acts which provide fixed sums for employers' liability to employees and make that recovery exclusive of all other liability to whomsoever. *Crowell v. Benson*, 285 U.S. 22; *New York Central Railroad Co. v. White*, 243 U.S. 188; *Hill Lines, Inc. v. Pittsburgh Plate Glass Co.*, 222 F.2d 854; *Underwood v. United States*, 207 F.2d 862. Both are intended to effect a definitely ascertainable legislative design.

Since the relief of public conveyance employees from liability for wrongful death was a part of the legitimate legislative scheme, it is not constitutionally objectionable for the legislature to leave them liable for negligent acts causing nonfatal injuries. This challenged result is entirely consistent with the unlimited liability of the employer for the same nonfatal negligent acts. Considered together, each facet of liability fits permissively into the symmetry of the legislative scheme and is not constitutionally infirm.

The judgment is affirmed.